(30,381)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 418

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, ETC., PETITIONER,

vs.

JOHN L. ROPER LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE STATE OF VIRGINIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1924

[fol. 1] **IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND**

JAMES C. DAVIS, Director General of Railroads and Agent under Section 206 of the Transportation Act of 1920 (Norfolk-Southern Railroad Division), Plaintiff in Error (Defendant Below),

vs.

JOHN L. ROPER LUMBER COMPANY, a Corporation, Defendant in Error (Plaintiff Below)

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The petitioner is aggrieved by a judgment of the Court of Law and Chancery of the City of Norfolk, entered on the 10th day of August, 1921, against the petitioner, wherein the court overruled the petitioner's motion for a new trial and in arrest of judgment, and entered judgment in favor of the defendant in error against petitioner for the sum of $1,046.88, with interest from July 15, 1918, and costs; the court having tried the case without jury on the 19th day of July, 1921, and having then adjudged that the defendant in error and plaintiff below do recover of the petitioner and defendant below the said amount.

A transcript of the record is herewith filed.

For the sake of simplicity, and to avoid confusion, the parties will be designated in this petition as plaintiff and defendant, in accordance with their positions in the trial court, the defendant below being the petitioner and plaintiff in error, and the plaintiff below being the defendant in error.

[fol. 2] I. Assignment of Errors

1. The court erred in overruling the defendant's motion for a new trial and in arrest of judgment, and in entering judgment against the defendant. (R. 4 and 9.)

2. The court erred in holding that the plaintiff was entitled to recover against the defendant on the claim in suit without having given notice of said claim in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or within six months after a reasonable time for delivery, in accordance with the terms of the bill of lading.

3. The court erred in holding that the circumstances of the case brought the plaintiff within the terms of the Cummins Amendment to Section 20 of the Interstate Commerce Act excusing, under certain conditions, notice and filing of claim as a condition precedent to recovery.

II. Statement

The case was tried wholly upon an agreed statement of facts. This statement is found in the record at pages 4 to 6, inclusive. No better statement of the facts could be here made, and it would be a vain thing to lengthen this petition by repeating here the agreed statement. Therefore, the court is referred to same at the pages mentioned above for a complete statement of the case.

III. Proceedings

The pleadings consist of a notice of motion for judgment found at pages 1 to 3, inclusive, with acceptance of service thereon, to which the defendant pleaded the general issue (R. 3).

On July 19, 1921, both parties waived jury, the court proceeded to hear the evidence, and try the case, and to render judgment as stated above (R. 4).

Defendant moved for a new trial and in arrest of judgment on July 20, 1920, and on August 10, 1921, the court overruled said motion and entered final judgment as aforesaid.

[fol. 3]

IV. Argument

It appears from the facts as agreed that the defendant admits wrongful delivery at destinations, and the plaintiff admits that no claim was filed within six months. The only question before the court is the legal question whether the provisions of Section 20 of the Interstate Commerce Act in force at the time excused the plaintiff from filing claim within the time provided under the bill of lading.

The third paragraph of Section 3 of the bill of lading conditions was the following language (R. 9):

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make a delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

The closing sentence of Section 20 of the Interstate Commerce Act, as it read at the time that the alleged cause of action herein accrued, was as follows:

"Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. (24 Stat. 386, 34 Stat. 595, 38 Stat. 1196, 39 Stat. 441.)" 8 U. S. Comp. Stat., p. 9291, Sec. 8604.

The plaintiff contends that no notice of claim was required because the case comes within the language "damaged in transit by carelessness or negligence," as found in this statute. It, therefore, becomes

necessary to interpret the meaning of this statute and apply same to the facts of this case. It is obvious that the plaintiff in this case does not complain of loss "due to delay or damage while being loaded or unloaded." We may, therefore, simplify our problem by eliminating that phrase of the Act from consideration. With this elimination, the Act excuses filing of claim "if the loss, damage or injury complained of was due to * * * damaged in transit by carelessness or negligence." At best, the language of this Act is incoherent and almost unintelligible. The English of the sentence defies analysis. [fol. 4] "But" (as said by the court in the Missouri case of Loesch vs. Union, &c., Co., 75 S. W. 621, 625), " courts are often required to discover the meaning of contracts awkwardly expressed." And the same is equally true as to the meaning of statutes.

1. The Plaintiff Was Not Excused from Filing Claim Because the Damage Complained of Was Not Sustained While the Shipment Was "In Transit."

In order for a plaintiff to bring himself within the exception excusing the filing of claim, as provided in the statute under consideration, it is necessary not only that there should have been damage by carelessness or negligence, but that the alleged damage occur in transit.

The plaintiff is not excused from giving notice, because the property was not in transit when the defendant made wrongful delivery without requiring surrender of bill of lading. On the contrary, the property was at destination and transit was completed.

This precise question has been dealt with, and decided in favor of our present contention, by the First Department of the Appellate Division of the Supreme Court of New York (May 2, 1919), in the case of Bell, et al., vs. New York Central R. Co., 175 N. Y. Sup. 712, from which case we quote as follows:

"It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (1) Those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of claims as a condition precedent to recovery, but authorized a requirement that suit be instituted within two years.

"In the bill of lading provision adopted under the authority of the amendment, we find first the requirement for the filing of a claim in [fol. 5] non-transit cases within four months, which is a condition precedent to recovery. No provision whatever is made limiting the time within which suit may be instituted in the case of non-transit losses where claims are filed. The next sentence has for its purpose the fixing of a two-year limitation for the institution of suit in transit cases, and prescribes the period as two years. It reads:

" 'Suits for recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years,' etc.

"It is obvious that the claim in suit is within the class which we have called for brevity the transit cases, and that therefore it is one for a loss of which notice is not required, and for which a claim does not have to be filed in writing."

* * * * * * *

"The meaning of the provision in the bill of lading therefore is this: In non-transit cases, notice of claim must be filed with the carrier within four months, as specified, which is a condition precedent to recovery. In such cases, where the notice of claim is filed, the short statute of limitations does not apply. In all other cases, namely, transit loss cases, suit must be instituted within two years."

The New York case was the reverse of the case at bar because it was a transit case; and the case at bar comes within the category of non-transit cases wherein the New York court held filing of claim to be necessary. The only difference between the bills of lading in the two cases is that in the New York case the bill of lading was of a later vintage and had been revised to conform to the terms of the Cummins Amendment. In the case at bar such revision had not been made, but in contemplation of law the Cummins Amendment must be read into the bill of lading.

In the Texas case of Royal Insurance Company vs. Texas, &c., R. Co., 115 S. W. 117, a fire policy on cotton exempted the insurer from liability for fire occurring on open cars in tranist. The court held that cotton on a car stationary at the point of origin was not covered by the policy, and at page 121 defined "intransit" as meaning "literally in course of passing from point to point."

Two other Texas cases deal even more explicitly with this question, and are cited and quoted below.

[fol. 6] Amory Mfg. Co. vs. Gulf, &c., R. Co., 37 S. W. 856, 857:

"Was the cotton, while on the compress platform, 'in transit' within the meaning of the bill of lading? It is contended upon the one side that the words 'in transit' are the equivalent of the words 'in transitu,' and that goods in the hands of a carrier are in transit from the moment of delivery to the carrier until they reach the hands of the consignee. In a sense, the meaning of the two phrases is the same. The one is a literal translation of the other. But, as actually employed, they have a materially different meaning and application. 'In transit' means literally in course of passing from point to point, and such is its common acceptation. Such, also, is the literal meaning of the phrase 'in transitu' but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It

would seem, therefore, that, if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. Had they done so, a more difficult question would have been presented. But here the words 'in transit,' the words actually used, according to their ordinary signification, apply only to the cotton from the time the transportation was to begin until the time it was to end under the contract. The cotton, not having been set in motion towards its destination, was not in fact in transit; and we cannot hold it constructively in transit while on the platform, without unwarrantably extending the meaning of a well-defined word, and doing violence to a well-established canon of construction."

Gulf, &c. R. Co. vs. Pepperell Mfg. Co., 37 S. W. 965:

"In an action against a railroad company for loss of cotton belonging to plaintiff, it appeared that the cotton was placed on the platform of a compress company to be compressed; that, while it was in possession of such company, on its platform, defendant executed bills of lading, binding itself to transport it; and that it was afterwards burned while on such platform. Held, that such cotton was not 'in depot or place of transshipment,' nor 'in transit,' within a provision in such bill of lading that neither such company nor any connecting carrier, while 'in transit' or while 'in depot or place of transshipment,' etc., should be liable for loss, etc."

[fol. 7] 2. The Case at Bar Comes Within the Category of a Non-delivery Case, as to which the Filing of Claim is Required, Rather Than in That of a Transit Case, as to Which the Filing of Claim is Excused.

By reading the pertinent portion of the Cummins Amendment into the bill of lading provision under consideration, it appears that the statute contemplates transit cases and non-delivery cases. Thus interpreted, wrongful delivery without surrender of bill of lading is not a loss, damage or injury due to delay or damage in transit. On the contrary, the wrongful delivery comes within the bill of lading category of "failure to make delivery."

A similar provision was contained in the bill of lading involved in the case of Blish Milling Co. vs. Railway, 241 U. S. 190, 195. At the time the Blish Milling Company shipment was made, the first Cummins Amendment had not been enacted, nor was there any statutory provision in reference to requirements for giving notice of claim or for filing claims. The facts in the Blish case were substantially identical with the facts here involved. There was a delivery without surrender of the bill of lading. Claimants sought to avoid the effect of the bill of lading provisions by ignoring the contract and suing for a conversion. The court, however, held that notwithstanding the form of the suit, the bill of lading provisions governed and were lawful and enforceable. It was contended that the pro-

vision with reference to failure to make delivery was inapplicable where delivery was made to the wrong party. The court in denying such contention said:

"But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are car- [fol. 8] ried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

The first Cummins Amendment recognizes and puts in statutory form this doctrine, limiting it, however, to cases where the loss, damage, or injury is not due to delay or damage while loading or unloading, or in transit, due to carelessness or negligence of the railway company.

(3) It is obvious from the context of the act that filing of claim is excused only in case of damage to the shipment while in transit. If the plaintiff should prevail in the contention that wrongful delivery at destination is covered by the language of the statutory provision under consideration, all of the provisions of the statute as to filing of claim would be nullified. The non-requirement of notice would apply to every conceivable case. That such is not the intent of the statute is plainly shown by reason of the fact that the very clause now under consideration is in itself clearly an exception. The existence of an exception presupposes a general rule outside of the exception. The plaintiff's contention would render the exception so broad as to leave nothing outside of it.

This argument is strengthened, indeed becomes unanswerable, in the light of the provision of the statute immediately preceding the concluding provision we have been considering, which provision is as follows:

"Provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing

of claims for a shorter period than four months, and for the institution of suits than two years."

It is obvious from the language of this provision that Congress has not intended to abolish completely the requirement of filing [fol. 9] claim. And in the case at bar the plaintiff's failure to file claim within six months is in entire accordance with the requirements of these provisions of the statute which have been quoted and considered in this argument.

The plaintiff, having failed to file claim within six months, as required under the bill of lading, cannot recover. The court should enter judgment for the defendant.

V. The Judgment of the Trial Court Should be Reversed and a Judgment in Favor of the Defendant Should be Entered by the Appellate Court.

Wherefore, the petitioner prays that a writ of error without supersedeas be awarded to the judgment of the Court of Law and Chancery of the City of Norfolk aforesaid; that the same may be reviewed and reversed; and a judgment entered in favor of the defendant.

And your petitioner will ever pray, etc.

James C. Davis, Director General of Railroads and Agent under Section 206 of the Transportation Act of 1920, by Hughes, Little & Seawell, His Attorneys.

I, the undersigned, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that, in my opinion, there is sufficient matter of error in the record accompanying this petition to render it proper that the judgment contained therein should be reviewed by this court.

R. M. Hughes, Jr. Hughes, Little & Seawell, Attorneys. R. M. Hughes, Jr., Solicitor.

Received June 6, 1922. Writ of error awarded. Bond $300.

F. W. Sims.

To the Clerk at Richmond.

Received June 19, 1922. H. S. J.

[fol. 10] IN COURT OF LAW AND CHANCERY

JOHN L. ROPER LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JOHN BARTON PAYNE, Director General of Railroads, Norfolk-Southern Railroad, and as Agent Provided for under Section 206 of the Transportation Act 1920, Defendant.

MOTION FOR JUDGMENT AND NOTICE THEREOF—Filed March 25, 1921

To John Barton Payne, Director General of Railroads, Norfolk Southern Railroad, and as agent provided for under Section 206 of the Transportation Act, 1920:

Take notice that on the 21st day of March, 1921, at the hour of ten o'clock (10:00) A. M. on that day, or so soon thereafter as the matter may be heard, John L. Roper Lumber Company shall move the Court of Law and Chancery for the City of Norfolk, Virginia, for a judgment against you for the sum of One Thousand and Forty-six Dollars and Eighty-eight Cents ($1,046.88), with interest thereon from the 1st day of July, 1918, and the costs of this proceeding the same being due to John L. Roper Lumber Company, by you as follows, to-wit:

Heretofore, to-wit: On the 24th day of June, 1918, John L. Roper Lumber Company delivered to Director General of Railroads, United States Railroad Administration, Norfolk-Southern Railroad, at Newbern, North Carolina, one carload of scrap iron for transportation to Clarksburg, West Virginia, and requested that an order notify bill of lading be issued therefor, and accordingly, the duly authorized Agent of said Director General of Railroads, at New Bern, North Carolina, on the 24th day of June, 1918, issued a bill of lading to said John L. Roper Lumber Company, consigning said car load [fol. 11] of scrap iron to John L. Roper Lumber Company, Clarksburg, West Virginia, notify George Yampolsky, Clarksburg West Virginia, and under and by virtue of the terms of said bill of lading this said shipment was to be delivered only to the lawful holder of said bill of lading, duly endorsed by said John L. Roper Lumber Company, whereas, the said Director General of Railroads, through his duly authorized agent, carelessly and negligently delivered said car load of scrap iron to George Yampolsky or some other person, without surrender of said bill of lading and without the knowledge or consent of John L. Roper Lumber Company and the person to whom said shipment was delivered was not the lawful holder of said bill of lading, the said John L. Roper Lumber Company being the lawful holder of said bill of lading, never having delivered said bill of lading to any other person, and said John L. Roper Lumber Company is now the lawful holder of said bill of lading, the same being in its possession, and the said Director General of Railroads has wholly failed and refused to deliver said shipment to it, and has failed and refused to pay said John L. Roper Lumber Company the

value of said shipment, though often requested so to do, and that on account of the said negligence and carelessness of the said Director General of Railroads, John L. Roper Company has been damaged to the extent of the value of said shipment, in the amount of One Thousand and Forty-six Dollars and Eighty-eight Cents ($1,046.88) together with interest thereon from the 1st day of July, 1918.

John L. Roper Lumber Company, by C. M. Bain, its Counsel.

C. M. Bain, p. q.

Endorsed: Service accepted. John Barton Payne, Director General & Agent, by Hughes, Little & Seawell.

Which motion was accordingly docketed.

[fol. 12] IN COURT OF LAW AND CHANCERY

JUDGMENT—July 19, 1921

This day came the parties by their attorneys and the defendant pleaded not guilty, to which the plaintiff replies generally, and no jury being demanded, the Court proceeded to hear the evidence and try the case. And the evidence being fully heard on an agreed statement of facts it is considered by the Court that the plaintiff recover of the defendant the sum of One Thousand and forty-six dollars and eight-eight cents ($1,046.88) with legal interest thereon from the 15th day of July, 1918, till paid and its costs in this behalf expended.

IN COURT OF LAW AND CHANCERY

AGREED STATEMENT OF FACTS

For the purpose of this action it is agreed that the following facts shall be found by the Court and that judgment shall be rendered thereon as the Court may determine the law therefrom.

In accordance with the Acts of Congress and Proclamations of the President of the United States, the President of the United States of America took possession of the line of railroad of Norfolk-Southern Railroad Company on January 1, 1918, and said line of railroad, in accordance with said Acts of Congress and Proclamations of the President of the United States, was operated by the United States Railroad Administration, and Director General of Railroads, so appointed by the President of the United States, from the 1st day of January, 1918, to and including the 29th day of February, 1920.

That James C. Davis has been appointed Director General of Railroads, and as Agent provided for in Section 206 of the Transportation Act of 1920.

That on the 24th day of June, 1918, John L. Roper Lumber Company delivered to the Agent of Director General of Railroads,

United States Railroad Administration, Norfolk Southern Railroads, at Newbern, North Carolina, one car load of scrap iron for transportation from New Bern, North Carolina, to Clarksburg, West Virginia, and requested that an Order Notify Bill of Lading be issued therefor. Accordingly, the duly authorized Agent of United States Railroad Administration, Director General of Railroads, Norfolk Southern Railroad, at Newbern, North Carolina, on the 24th day of June, 1918, issued to John L. Roper Company a Bill of Lading for said car load of scrap iron, consigning the same to John L. Roper Lumber Company, Clarksburg, West Virginia, notify George Yampolsky, Clarksburg, West Virginia.

[fol. 13] That said Director General of Railroads caused the said car load of scrap iron to be transported from Newbern, North Carolina, to Clarksburg, West Virginia, the Agent of the said Director General of Railroads, at Clarksburg, West Virginia, delivered said shipment to George Yampolsky without surrender of the Original Order Notify Bill of Lading.

That the said shipment was delivered to said George Yampolsky without the knowledge or consent of John L. Roper Lumber Company, and the person to whom the shipment was delivered was not the lawful holder of the said Original Order Notify Bill of Lading. John L. Roper Lumber Company has never delivered the Bill of Lading to any other person and has never endorsed the same, and John L. Roper Lumber Company is now the lawful holder of said Bill of Lading.

The shipment arrived at Clarksburg, West Virginia, on or about the 15th day of July, 1918, and was delivered to George Yampolsky by the Director General of Railroads on or about the 15th day of July, 1918.

No claim in writing to the carrier at point of delivery or at point of origin was filed by John L. Roper Lumber Company until March 5, 1920. A copy of the Bill of Lading issued by Director General of Railroads to John L. Roper Lumber Company, June 24, 1918, is hereto attached as Exhibit "A." The value of said shipment is agreed to be $1,046.88.

C. M. Bain, Attorney for Plaintiff. R. M. Hughes, Jr., Attorney for Defendant.

This 16th day of July, 1921.

Standard Form Order Bill of Lading

Norfolk Southern Railroad Company

Order Bill of Lading—Original

Shipper's No. —. Agent's No. —.

Received, subject to the classification and tariffs in effect on the date of issue of this Original Bill of Lading, at Newbern, N. C., [fol. 14] 6-24-18, 19—, from John L. Roper Lumber Co., the property described below, in apparent good order, except as noted (con-

tents and conditions of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its own line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and acepted for himself and his assigns.

This Bill of aLding is assignable but not negotiable, except in so far as may be required to carry out the promise of the carrier made in the following surrender clause, and is enforceable as provided in Section 10 of this Bill of Lading, according to its original tenor and effect.

The surrender of this Original order Bill of Lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from —— to —— is in Cents per 100 Lbs If Times 1st Class. If 1st Class. If 2nd Class. If Rule 25. If 3d Class. If Rule 26. If Rule 28. If 4th Class. If 5th Class. If 6th Class. If Class A. If Class B. If Class C. If Class D. If Class E. If Class H. Per Barrel, If Class F. If Special, per —.

(Mail Address—Not for Purposes of Delivery.)

Consigned to order of John L. Roper Lumber Co., Destination, Clarksburg, State of W. Va., County of ——, Notify Geo. Yampolsky, at Clarksburg, State of W. Va., County of ——, Route N. S. Suffolk N. & W. for B. & O. Del'y. Car Initial, SOU. Car No. 187064.

No. Packages. Description of Articles and Special Marks, Car load scrap iron. No Seals—Gondola. Weight (Subject to Correction). Class or Rate. Check Column.

[fol. 15] If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $— to apply in prepayment of the charges on the property described hereon.

—— ——, Agent or Cashier, per —— ——.

(The signature here acknowledges only the amount prepaid.

Charges advanced: $—.

John L. Roper Lumber Co., rfc. J. P. C. Davis, Agent, per H.

Conditions

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from riots or strikes; or for country damage on cotton. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in [fol. 16] open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars), shall be liable only for negligence.

In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by guarantine regulations or authorities, or for the carrier's despatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carrier at owner's expense and risk to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employes, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and, except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if

such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been [fol. 17] represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of [fol. 18] any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges

hereunder, and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves or landings, shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight, and average, if any, and all other lawful charges accruing on said property, and if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in Section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lake, sea [fol. 19] or other waters; or from vermin, leakage, chafing, breakage, heat, frost, wet, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, whether existing prior to, at the time of, or after sailing; or unseaworthiness, or from collision, stranding or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, to tranship, to lighter, to load and discharge goods at any time, and assist vessels in distress, and to deviate for the purpose of saving life or property. Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

The term "water carriage" in this section shall not be construed as

including lighterage across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to to its original tenor.

Sec. 11. The terms and conditions of this bill of lading with respect to interstate shipments are subject to the provisions of the Act to Regulate Commerce and the Amendments thereto, including the so-called Cummins Amendment, aid are effective only so far as not inconsistent with such provisions.

E. D. Kyle, Traffic Manager, Norfolk, Va. J. F. Dalton, General Freight Agent, Norfolk, Va.

And afterwards, on the 20th day of July, 1920:

This day came again the defefendant, by his attorney, and thereupon moved for a new trial of the case in which judgment was entered on yesterday, and in arrest of judgment on the ground, that said judgment is contrary to the law and the evidence, the further hearing of which motion is adjourned.

[fols. 20 & 21] And now, on this 10th day of August, 1921:

This day came again the parties by their attorneys and the defendant's motion for a new trial and in arrest of judgment, being fully heard, is overruled, to which action of the Court the defendant excepts and leave is given it to file its exceptions at a future day.

IN COURT OF LAW AND CHANCERY

CLERK'S CERTIFICATE

I, James V. Trehy, Clerk of the Court of Law and Chancery of the City of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of John L. Roper Lumber Company, a corporation, plaintiff, vs. John Barton Payne, Director General of Railroads, Norfolk Southern Railroad, Defendants, lately pending in said Court.

I further certify that the said copy was not made up and completed until the plaintiff has had due notice of the making of the same and the intention of the defendant to take an appeal therein.

Given under my hand this 6th day of September, 1921.

James V. Trehy, Clerk.

Fee for this record, $10.00.

A copy—teste: H. Stewart Jones, C. C.

[fol. 22] IN SUPREME COURT OF APPEALS

[Title omitted]

Court of Law and Chancery of City of Norfolk

SIMS, J.:

This is an action instituted by notice of motion by the defendant in error, John L. Roper Lumber Company, (hereinafter called plaintiff), against the plaintiff in error, (hereinafter called the defendant), in which the plaintiff, the lawful holder of an order notify bill of lading covering an interstate shipment of property, seeks to recover the value of the property as a liability imposed upon the defendant by the Federal statute, section 20 of the Interstate Commerce Act, as amended by the Carmack and the first and second Cummins Amendments, being the loss or damage occasioned the plaintiff by the negligence of the defendant while the property was in transit, consisting of the wrongful conversion of the property by the negligent delivery of it by the defendant to a third person, without requiring the surrender of the bill of lading.

No jury being demanded, the court below heard the evidence, and tried and decided the case without a jury. The decision and judgment of the court was for the plaintiff for the sum of $1,046.88, the value of the property. It is that judgment which is under review. [fol. 23] The case was heard and decided, as aforesaid, upon the following agreed statement of facts:

"Agreed Statement of Facts"

"For the purpose of this action it is agreed that the following facts shall be found by the Court and that judgment shall be rendered thereon as the Court may determine the law therefrom.

"In accordance with the Acts of Congress and Proclamations of the President of the United States, the President of the United States of America took possession of the line of railroad of Norfolk-Southern Railroad Company on January 1, 1918, and said line of railroad, in accordance with said Acts of Congress and Proclamations of the President of the United States, was operated by the United States Railroad Administration, and Director-General of Railroads, so appointed by the President of the United States, from the 1st day of January, 1918, to and including the 29th day of February 1920.

"That James C. Davis has been appointed Director General of Railroads, and as Agent provided for in section 206 of the Transportation Act of 1920.

"That on the 24th day of June, 1918, John L. Roper Lumber Company delivered to the Agent of Director General of Railroads, [fol. 24] United States Railroad Administration, Norfolk-Southern Railroad, at New Bern, North Carolina, one carload of scrap iron for transportation from New Bern, North Carolina to Clarksburg, West Virginia, and requested that an Order Notify Bill of Lading be issued thereof. Accordingly, the duly authorized Agent of United

States Railroad Administration, Director General of Railroads, Norfolk-Southern Railroad at New Bern, North Carolina, on the 24th day of June, 1918, issued to John L. Roper Company a Bill of Lading for said car load of scrap iron, consigning the same to John L. Roper Lumber Company, Clarksburg, West Virginia, Notify George Yampolsky, Clarksburg, West Virginia.

"That said Director General of Railroads caused the said carload of scrap iron to be transported from New Bern, North Carolina, to Clarksburg, West Virginia, the Agent of the said Director General of Railroads, at Clarksburg, West Virginia, delivered said shipment to George Yampolsky without surrender of the Original Order Notify Bill of Lading.

"That the said shipment was delivered to the said George Yampolsky without the knowledge or consent of John L. Roper Lumber Company, and the person to whom the shipment was delivered was [fol. 25] not the lawful holder of the said original order Notify Bill of Lading. John L. Roper Lumber Company has never delivered the Bill of Lading to any other person and has never endorsed the same, and John L. Roper Lumber Company is now the lawful holder of said Bill of Lading.

"The shipment arrived at Clarksburg, West Virginia, on or about the 15th day of July, 1918, and was delivered to George Yampolsky by the Director General of Railroads on or about the 15th day of July, 1918.

"No claim in writing to the carrier at point of delivery or at point of origin was filed by John L. Roper Lumber Company until March 5, 1920. A copy of the Bill of Lading issued by Director General of Railroads to John L. Roper Lumber Company, June 24, 1918 is hereto attached as Exhibit "A." The value of said shipment is said to be $1,046.88."

The bill of lading referred to in this statement was in evidence and contained the following provision:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make delivery of the property, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

[fol. 26] The aforesaid Federal Statute (8 U. S. Comp. Stat. p. 9291 sec. 8604a) is, so far as material, as follows:

"Any common carrier * * * receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property," * * * and * * * shall be liable to the lawful holder of said receipt or bill of lading * * * for the full actual loss, damage, or injury to such property caused by it or by any * * * common carrier * * * to which such property may be delivered or over whose line or lines such property

may pass * * * Provided * * *, that it shall be unlawful for any * * * common carrier to provide by * * * contract * * * or otherwise a shorter period for giving notice of claims than ninety days and for filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim or filing of claim shall be required as a condition precedent to recovery."

SIMS, P., after making the foregoing statement, delivered the following opinion of the court:

[fol. 27] There is but a single question involved in the decision of this case and that is as follows:

1. In an action to recover the liability imposed upon a common carrier by the Federal Statute, (Section 20 of the Interstate Commerce Act as amended by the Carmack and the first and second Cummins' Amendments), for loss or damage occasioned the plaintiff by the negligence of the carrier, which negligence consists of the negligent misdelivery by the terminal carrier, which occurs at the place of destination and before the contract of carriage is completed, to a third person not entitled to receive it, of property of the plaintiff received by the carrier for interstate transportation, is any contract requirement of notice of claim, or filing of claim for such loss or damage, as a condition precedent to recovery, a valid requirement?

The question must be answered in the negative.

The decision of the question just stated is not free from difficulty. Its final decision will depend, of course, on the ruling of the Supreme Court upon it, but, as yet, there has been no decision of that high tribunal upon the precise question. There have been a few decisions of courts of lesser jurisdiction upon the question, which, however, are not in harmony; and the ascertainment of the proper construc-[fol. 28] tion of the Statute, upon the meaning of which the decision depends, is more than ordinarily difficult because of the phraseology and punctuation of the Statute.

Indeed, in the petition of the defendant for the writ of error in the instant case, this is said: "At best, the language of this Act is incoherent and almost unintelligible. The English of the sentence," (the proviso presently to be particularly mentioned), "defies analysis." And in several of the decisions the same is said in substance. It is manifest, therefore, that no dependable construction of the statute can be derived from the method of giving to its words merely their literal meaning.

For example, the words of that portion of the statute which imposes the liability are that the carrier shall be liable "for any loss, damage, or injury to such property," and, what is the same thing, as stated in another part of the statute, "for the full actual loss,

damage or injury to such property,"—the literal meaning of which is that the only liability imposed by the statute is for loss of, or damage to, or injury to, the whole or some portion of the property itself,—that the liability is so classified that the property itself must be thus affected in order that the liability may exist,—that no liability is imposed for any personal loss or damage suffered by the plaintiff, such as loss of a sale of the property, expense incurred, [fol. 29] or other incidental personal loss or damage not of or to the property itself, although due to the failure of the carrier to perform the contract of carriage in some particular, such as unreasonable delay in the transportation of the property. That is to say, if the literal meaning of the words is to be taken, the classification by the statute of the liability imposed is not of loss or damage to the shipper, but of loss or damage to the property only. But it is settled that such literal construction is not the true construction of the statute. In Norfolk Trucker's Exch. v. Norfolk Co., 116 Va. 466, at p. 466, 9 Va. App. 364 this is said: "We are of opinion that the amendment" (the Carmack Amendment, which contains the language of the statute above quoted, "for any loss, damage, or injury to such property"), " is broad enough to cover a case of damage to the shipper by reason of delay." To the same effect see N. Y. P. & N. R. Co., v. Chandler, 129 Va., 695.

Similarly, when we come to construe the language of the proviso of the statute as to non-requirement of any notice of claim or filing of claim in certain cases,—which is relied on as decisive of the instant case by both the plaintiff and defendant—,we find that we cannot give to certain of its words the literal meaning which they may seem to import.

The proviso of the statute in question is as follows:

[fol. 30] "Provided, however, that if the loss, damage, or injury, complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The clause in the bill of lading which the court below held, in effect, as forbidden by, and hence invalid under said proviso, in so far as it would otherwise have been applicable to the instant case, is as follows:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

[fol. 31] It will be observed that the period, in which such clause requires the making of claim, is longer than the period within which the statute permits notice or filing of claim to be required as a condition precedent to the right of recovery in any case of liability

under the statute, in which the statute permits any such requirement at all. Therefore, the bill of lading is not in conflict with the statute so far as the length of the period mentioned is concerned.

This is a case of failure to make delivery, in accordance with the contract of carriage, of the property received by the carrier for interstate transportation, because of the negligent misdelivery of such property by the terminal carrier, which occurred at the place of destination, but before the contract of carriage was completed, and no claim was made in writing to the carrier at the point of delivery or at the point of origin within six months after a reasonable time for delivery had elapsed, as undertaken to be required by the aforesaid clause in the bill of lading.

One of the positions taken in argument for the defendant is that this is a case of total loss of the property; that it cannot be contended that it falls within any of the provisions of the aforesaid proviso of the statute other than "damaged in transit by carelessness or negligence;" and that the word "damaged" as there used has reference solely to "loss * * * complained of * * * due to * * *" (damage or injury to the property while the [fol. 32] property is) "in transit, by carelessness or negligence;" and does not embrace "loss * * * complained of * * * due to * * *" (damage or injury to the shipper while the property is) "in transit, by carelessness or negligence;" and the following decisions of State courts, cited and relied on for the defendant, do hold that cases of total loss of the property are not embraced in the said proviso. Henninger Produce Co. v. American Ry. Express Co., (Minn.), 188 N. W. 272; Conover v. Railway, 212 Ill. App. 29; and St. Sing et al. v. American Express Co., (N. C.), 111 S. D. 710. But these cases rest wholly upon the position that the literal meaning of the words of the proviso must be given to them. As we have seen, such a rule of interpretation cannot be relied on in the interpretation of this statute.

In Henninger Produce Co. v. American Ry. Express Co., the aforesaid holding was indeed *obiter, as* there was no finding of negligence on the part of the carrier in that case. The opinion of the court in that case says this: "* * * Its (the plaintiff's) argument is that the merchandise was lost in transit, and by negligence, and therefore the limitation" (the requirement in the bill of lading of claim to be made within four months after a reasonable time for delivery), "does not apply. We are unable to take this view. *The* [fol. 33] *language of the statute is plain.* It was found by the court that the butter 'was lost in transit and was not and has never been delivered.' *There was no finding on negligence.* Even where merchandise is lost in transit by negligence *the language of the Cummins Amendment* does not dispense with the making of a claim. *We are not* cited a case entirely controlling upon this point. Conover v. Railroad, 212 Ill. App. 29, bears upon it." (Italics supplied.)

In the Conover case, referred to in the opinion just mentioned and also supra, (212 Ill. App. 29), the court cites no authority and rests its holding solely on the words of the proviso, without stating any reasons therefor. All that the court says in its holding on the

subject in the Conover Case is this: "loss of grain from a car cannot reasonably be included in the exemption of loss, damage or injury * * * due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence."

In St. Sing et al. v. American Express Co., supra, (111 S. E. 710), the property was never delivered to the consignee at destination because, in the usual course taken with non-delivered parcels, it was sent to another point and there sold by the terminal carrier as unclaimed goods. The court in its opinion said this: "This being an interstate shipment, the Federal statutes applicable and the au- [fol. 34] thoritative decisions thereon afford the exclusive rule of liability on these cases, and by them it is clearly recognized that a rule requiring that the party aggrieved by breach of contract of carriage and as condition precedent to recovery, shall file with the company a written claim of his damages within four months * * * after a reasonable time for delivery has elapsed, is reasonable and valid." Citing Texas etc. R. Co. v. Leatherwood, 250 U. S. 478, 39 Sup. Ct. 517, 63 L. Ed. 1096; Georgia etc. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; Taft v. Railroad, 174 N. C. 211, 93 S. E. 752; Phillips v. Railroad, 172 N. C. 86, 89 S. E. 1057; and Mann v. Transportation Co., 176 N. C. 104, 105, 96 S. E. 731.

An examination of the last mentioned decisions discloses that they all involve cases which arose prior to the first Cummins amendment, when the statute in question contained only the Carmack Amendment—when it did not contain the aforesaid proviso—with the single exception of the case of Mann v. Transportation Co.; and the holding of the latter case seems to me to be directly contrary to the aforesaid holding in the St. Sing case for which it is cited.

In Mann v. Transportation Co., the case arose under and was [fol. 35] controlled by the first Cummins Amendment, which contained the aforesaid proviso. It involved an interstate shipment of hogs. The shipment was received at destination "one of the hogs missing, and four died and the others in a greatly damaged condition. This incident to the wrongful delay and negligence of the transportation." There was in the bill of lading precisely the same clause with respect to requiring claim to be made in writing within four months of delivery of the property, or, in case of failure to make delivery, within four months after a reasonable time for delivery had elapsed, and providing that unless the claims were so made the carrier should not be liable. The plaintiff shipper made no claim in writing within the four months after the delivery of the property which was delivered, or within four months after a reasonable time for delivery of the property which was not delivered, had elapsed. There was a special verdict finding that the "*plaintiff*" was "injured *by damage* done to his hogs by the negligence of the defendant's connecting carriers." (Italics supplied.) Because of such failure of the plaintiff to make such claims within such time, as required by the bill of lading, the trial court entered judgment for the defendant, the transportation company. The appellate court reversed the case and in the opinion of the court, (175 N. C. at p. 107) this is said:

[fol. 36] "* * * the last clause of this amendatory act" (referring to the aforesaid proviso) "provides that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice nor filing of claim shall be required as a condition precedent to recovery.

"The verdict having established that the loss and damage complained of in the present instance was caused by the negligence of the connecting carrier, the plaintiff's claim comes clearly within the express terms of the statute, and defendant is thereby deprived of any defense which might arise from failure of plaintiff to give the notice."

It will be observed that the North Carolina court, in the case just mentioned, did not take the view that the aforesaid proviso is confined in its application to cases of loss, damage or injury due to damage or injury to the property itself, which is the construction contended for in argument for the defendant in the instant case; but construed the proviso as embracing injury to the plaintiff shipper, consisting of loss, as well as damage, suffered by him personally, when caused by the negligence of the carrier in the performance of the contract of carriage. That is to say, the holding, in [fol. 37] effect, is that the aforesaid proviso embraces all cases of liability for personal loss occasioned the plaintiff shipper, by non-delivery due to negligence in the performance of the contract of carriage, as well as cases of liability for personal loss or damage to the plaintiff shipper due to damage to the property itself while in transit, and that the application of the proviso is not confined to cases of damage to the property itself while in transit. In other words, the holding of the decision under consideration is, in effect, that the proviso when read along with the residue of the statute, forbids any common carrier, by contract provision in the bill of lading or otherwise, to require any notice of claim or filing of claim as a condition precedent to recovery upon any liability imposed by the aforesaid Federal statute where the personal loss, damage or injury complained of is due to negligence in the performance of the contract of carriage,—leaving the carrier free to require, by contract provision in the bill of lading, notice of claim within not less than ninety days and filing of claim within not less than four months, and for the institution of suits within two years, from the time the cause of action may have arisen, as a condition precedent to recovery, upon any liability imposed by the statute in all cases where the personal loss, damage or injury complained of is not due to [fol. 38] negligence in the performance of the contract of carriage, but is of the character of liability imposed by the statute which rests upon the obligation of the carrier as an insurer.

If such is the correct construction of the proviso—and we think that it is—the statute as a whole classifies claims thereunder, of which notice of or filing can, or cannot, be required as a condition precedent to recovery, into two kinds and only two, which together embrace all claims for which liability is imposed by the statute,

namely, (1) those for which the liability does not arise from negligence in performance of the contract of carriage, but from the obligation of the carrier as an insurer, in which cases notice of or filing of the claims can be required; and (2) those for which the liability arises from such negligence, in which cases notice of a filing of the claims cannot be required, as a condition precedent to recovery.

And to us this seems to be a reasonable classification, since it dispenses with the requirement of any notice of claim to the carrier within the periods mentioned after the cause of action arose only in cases in which the carrier is liable because of its own or its connecting carrier's negligent conduct; which is a matter of fact peculiarly within the knowledge of the defendant carrier, or within its power [fol. 39] to obtain and preserve evidence of, by merely keeping, or having kept, for the period within which suit may be brought, the record of the condition of the property, the occurrences affecting it and what disposition is made of it, in all the several stages of its transit, from its receipt by the initial carrier until the contract of carriage terminates; and allow the notice to the carrier to be required, within certain periods as specified in the statute, (the length of which being dependent upon the character of the notice, being by notice of claim or by filing of claim) as a condition precedent to recovery in all cases in which the carrier is liable as an insurer, for loss, damage or injury due to some obscure and unknown cause, not within the knowledge of the defendant carrier or within its power to obtain and preserve evidence of, by keeping or having kept such a record as aforesaid,—in which character of cases it is but just that the carrier should have notice of claim within a reasonable time after the alleged cause of action arose, so that it may make special enquiry touching the facts which its records and the records of the connecting carrier could not be reasonably expected to show, before the evidence thereof has become lost.

Moreover, such construction of the statute makes its meaning intelligible and plain; whereas when any other meaning is attempted to be given to it, the statute becomes inconsistent, confused and unintelligible.

[fol. 40] Further: There are a number of decisions which hold that such is the true construction of the statute in question—some of them by Federal courts, others by State courts, all involving the construction of the statute, and some of them involving substantially the same material facts that are involved in the instant case. See Morrell v. Northern Pac. Ry. (N. D.), 179 N. W. 922; Bell v. N. Y. Central R. Co., 175 N. Y. Supp. 712; Hailey v. Oregon etc. R. Co. (District court, D. Idaho S. D.), 253 Fed. 569; Gillette etc. Co. v. Davis, (Director General), (Circuit Ct. of Appeals 1st Dist.), 278 Fed. 864; and Winstead v. East etc. Ry. (N. C.), 118 S. E. 887.

In Morrell v. Northern Pacific Ry. Supra, the cause of action arose under the aforesaid Federal statute after the enactment of the second Cummins Amendment. There was a shipment of certain cattle which were never delivered. Different cattle from those shipped were delivered to the consignee at destination—the exchange of cattle having occurred while the cattle were in transit, before they reached

the destination, and being due to the negligence of the carrier. There was a claim in the bill of lading requiring notice of claim within 90 days from the time the cause of action arose as a condition precedent to recovery. The court held that under the aforesaid proviso the clause in the bill of lading did not apply to the case, although it was [fol. 41] one of total loss of the property shipped, and not one of damage to the property, it being a case of non-delivery due to negligence of the carrier, which was embraced within the provisions of said proviso.

In the course of the opinion, in the case just cited, the court said this: "* * * From the facts established beyond dispute it appears that the stock covered by the contract was never delivered at destination and that the recovery is based on its non-delivery. The purpose of such a provision" (the clause in the bill of lading) "is doubtless to enable the carrier to investigate claims while the evidence is fresh, and thus affords a means of protection against fraudulent and exaggerated claims. That it was not intended to shield carriers from liability occasioned by their negligence may well be inferred from the provisions of section 8604a Comp. Stat. U. S. 1918, * * *" (quoting the aforesaid proviso). "In the instant case it appears * * * that the loss of the cattle was due to negligence, and it would therefore seem to be a case controlled by the proviso above quoted, wherein the carrier is prohibited from requiring notice as a condition precedent to recovery."

In Bell v. N. Y. Central R. Co., Supra (175 N. Y. Supp. 712), there was a shipment of pears. "The pears were unreasonably de- [fol. 42] layed in transit, the car was not properly placed for delivery, and several of the barrels and baskets containing the pears were broken open and the contents crushed and bruised." There was a clause in the bill of lading requiring making of claim substantially the same as in the bill of lading in the case in judgment. The cause of action arose under the aforesaid Federal statute after the adoption of the second Cummins Amendment. In the opinion of the court, after noting the aforesaid proviso, this is said: "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (1) Those for loss due to delay, or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months * * *. In the case of transit claims it forbade the carrier to require the filing of claim as a condition precedent to recovery * * *."

We cannot approve of the classification adopted by the court in the case just mentioned, which divides all cases of liability under the aforesaid Federal statute into two classes, transit and non-transit cases, for the reason that as aforesaid we think that all cases of liability under such statute are transit cases—there being no liability [fol. 43] under the statute before the contract of carriage is entered into or after it is completely performed, as the statute imposes lia-

bility only for the breach of the contract of carriage. The case, however, is in point in the holding that the aforesaid proviso forbids any notice or filing of claim being required as a precedent to recovery in any "transit case", as classified in the opinion, which classification covers such a case as the instant case, namely when there is a total loss of the property in transit.

In Hailey v. Oregon etc. R. Co., supra, 253 Fed. 569, the case arose under the Federal statute aforesaid and the action was instituted to recover damages occasioned the plaintiff by the non-delivery at destination of one of the horses shipped, by the death of two of the horses, for expenses of feed en route and for expenses of caring for and feeding of the remaining horses at destination in bringing them up to a fair condition for market, all caused by the negligence of the carrier while the shipment was in transit, but not while actually moving. There was a provision in the bill of lading as to making of claim substantially in the language of the aforesaid statute, including the proviso aforesaid. The court quotes and discusses the terms of the proviso and with respect to the proper construction of the proviso the opinion says this: "Upon consideration I am inclined to the view that the basis of classification intended by Congress must be found in the phrase "by carlessness or negli- [fol. 44] gence." It is used in no other place in the entire section, and in the absence of some other ground for classification it appears to be not improbable that the legislative mind made a distinction between liabilities resulting from the carrier's negligence and those which rest upon a different basis, and accordingly declared that the carrier should not require notice of claims of damages arising out of its own negligence. While, for reasons which it is unnecessary to explain, we may be unable to assent to the wisdom or justice of denying to the carrier this right, such seems to be the intent of the proviso. * * * The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damages "in transit" as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase "carelessness and negligence" undoubtedly qualifies "damaged in transit".

"In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in [fol. 45] other respects the structures were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit'. In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it. A claimant must either allege and prove notice and the filing of a claim, or must allege and prove negligence."

In Gillette etc. Co., v. Davis, (Director General), Supra, (278 Fed. 864), the case arose under the aforesaid Federal Statute and the action was for damages occasioned the plaintiff shipper by the non-delivery and total loss of the shipment, after it had reached the point of destination, due to the theft of the goods, which theft, it was alleged, was due to the negligence of the defendant, transacting the business of an express company. There was a clause in the bill of lading with respect to making claim which was substantially the same as in the instant case. The court quoted and construed the [fol. 46] meaning of the aforesaid proviso contained in the statute when read along with the provision in the preceding portion of the statute requiring the issue of a receipt or bill of lading for the property shipped and making the carrier "liable to the lawful holder thereof for any loss, damage or injury to such property carried by it or by any connecting carrier * * *" etc., and held that the case was embraced within the proviso, if the non-delivery and consequent total loss was due to the negligence of the defendant, and in the opinion this is said: "* * * it is clear that Congress intended by the language of the Act that the carrier should be responsible for loss *occasioned the consignee* by the carrier's negligent delay, negligence in loading or unloading, *and negligence in transit.*" * * * (Italics supplied.)

At common law a carrier was liable for "any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. Adams Express Co., v. Croninger, 226 U. S. 491, 509, 33 Sup. Ct. 148, 153, 57 L. ed. 314, 44 L. R. A. (N. S.) 257."

"Under section 7 of the bill of lading, as authorized by the Act of March 4, 1915," (containing the first Cummins Amendment which contains the aforesaid proviso), "the carrier is liable for any loss or damage resulting from any human agency, or some cause not the act [fol. 47] of God or the public enemy, in case the consignee has given notice in writing of a claim of loss within four months after delivery of the property, or, in case of failure to make delivery, has given such notice within four months after a reasonable time for delivery has elapsed. *And if the consignee has failed to give the requisite notice,* the carrier *is liable for* negligent delay, if any, in delivering the property, or *negligence* while loading or unloading it or *in transit,* resulting *in the consignee's loss.*" (Italics supplied.)

In Winstead v. East etc. Ry. Supra (118 S. E. 887), the cause of action also arose under the aforesaid Federal statute involved in the instant case. The action was for damages occasioned the plaintiff by the non-delivery and consequent total loss of a part of the shipment and by the delay in the transportation of the residue of the shipment of cotton, all due, as alleged, to the negligence of the carrier. There was in the bill of lading precisely the same clause with respect to making claim as in the bill of lading in the instant case. The court held that the alleged negligence was established by the evidence, and that the aforesaid proviso, when read in the light of the preceding provision of the statute, which require the carrier to issue the receipt or bill of lading for the property shipped, makes the car- [fol. 48] rier "liable to the lawful holder thereof for any loss, damage

or injury to such property carried by it or by any connecting carrier," etc., and that the proviso embraced the claim of dam[illegible]s to the plaintiff due to the total loss of a part of the shipment, as well as such damages due to the delay in the transportation of the residue of the shipment, and that the defendant carrier was, by the statute, "deprived of any defense arising from the failure of plaintiff to give notice of claim," both as to the former and the latter claims of the plaintiff. Citing Gillette etc. Co., v. Davis, and Hailey v. Oregon etc. R. Co., Supra, with approval.

The following other cases are cited in argument for the defendant to sustain the position "that a total loss in transit is not a damage in transit, within the meaning of the (aforesaid) statute," namely Missouri Pacific v. Reed. (Ark.), 228 S. W. 1047; Freeman v. A. C. L. (S. C.) 113, S. E. 69.

Missouri Pacific v. Reed involved an intra-state shipment only.

In Freeman v. A. C. L. it does not appear that the loss was due to the negligence of the carrier, and the opinion merely refers to Mills v. N. W. R. R. Co., 115 S. C. 224, 105 S. E. 343 as showing there could be no recovery in the absence of claim or notice of claim within the six months from delivery of the shipment required by the [fol. 49] bill of lading. No reference is made in the opinion to the Federal statute aforesaid, and, while the shipment was made after that statute was in force, it seems plain that the Federal statute was not called to the attention of the court and was not applied in that case. Reference to Mills v. N. W. R. R. Co., discloses that it involved an intra-state shipment only, making it manifest that the court in its holding did not have the Federal statute in mind.

It is further contended in argument for the defendant that the loss, damage or injury complained of in the instant case did not occur while the property was "in transit"; that after the property reached the point of destination it was no longer "in transit", although the contract of carriage had not been completely performed, by delivery according to the contract, or by the expiration of the free time for delivery; and Bell v. N. Y. Central R. Co., Supra (175 N. Y. Supp. 712); Royal Ins. Co., v. Texas, 115 S. W. 117; Amory M'fg. Co., v. Gulf etc. R. Co., 37 S. W., 857; and Gulf etc. [fol. 50] R. Co. v. Peperell M'f'g. Co., Idem 965; are cited in support of such contention.

Bell v. N. Y. Central R. Co., does not sustain the contention which it is cited to support. Although it does not appear from the report of the case whether the loss complained of in that case, which was occasioned by damage to a portion of the pears shipped, occurred before or after the pears reached the point of destination and were wrongly placed for delivery, the court held that it was a case of loss due to "damaged in transit", which it called a "transit" claim.'

The precise point involved in the Bell case was a mere matter of pleading—whether the court below was right in refusing to strike out the defense that the action was barred because not brought within two years. The appellate court held that the court below was right in its decision for the reason that, although it was a transit case, in which no requirement of making claim within four months

as a condition precedent to recovery was or could have been validly required by the bill of lading, yet the bill of lading contained the requirement, which was valid under the aforesaid Federal statute, that the action must be brought within two years. The court does not, it is true, in the opinion advert to the distinction above men- [fol. 51] tioned, namely, that the proviso aforesaid embraces only transit cases in which the loss, damage or injury complained of is due to negligence of the initial or connecting carrier. This omission, however, is doubtless explained by the fact that the court was dealing with a mere question of pleading, there being no objection to the pleading because of its lack of allegation of negligence so far as appears, and likely the pleadings as a whole or the record otherwise showed, although the report of the case does not disclose it that the case was one of negligence.

Royal Ins. Co., v. Texas did not involve any contract of carriage whatever, either interstate or intra-state; but merely the construction of the terms of a fire insurance policy issued to the railroad company materially different from the terms of the Federal statute which we have under consideration. The same is true of Amory M'f'g. Co. v. Gulf etc. R. Co., and Gulf etc. R. Co. v. Peperell M'f'g Co.

We think that "in transit", as used in the proviso aforesaid, means at any time after the property has been received by the initial carrier for interstate transportation and before the contract of carriage for the entire transportation is completely performed; and that the entire transportation includes delivery in accordance with the contract—which contract, of course, is assumed to be one [fol. 52] which is valid under the aforesaid Federal statute. Jennings etc. v. Virginian Ry., 30 Va. App. 1, 137 Va.—, S. E.—, and cases cited. See also Michigan etc. R. Co. v. Mark Owen & Co., 41 U. S. Sup. Ct. Rep. 554, 65 L. ed. 1032.

In the case last cited the loss or damage complained of was a total loss of a certain portion of the property shipped (grapes), occasioned by the negligence of the carrier after the grapes reached the point of destination and the car containing same in good condition had been placed on the proper delivery track; and the plaintiff had commenced unloading the property. The loss occurred after the acceptance of the car and its unloading had commenced, but before the 48 hours free time had expired after notice of its arrival had been sent in accordance with clause 5 of the bill of lading. Precisely the same clause is also contained in the bill of lading in the instant case. The Supreme Court held the defendant liable as carrier and in its opinion this is said: "* * * The property here was not delivered; access only was given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the railroad company, *the company having the same relation to it that the company acquired by its receipt and had during its transportation.*" (Italics supplied.)

The case will be affirmed.

Affirmed.

[fol. 53] IN SUPREME COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—January 16, 1924

Upon a writ of error to a judgment rendered by the court of Law and Chancery of the city of Norfolk on the 10th day of August, 1921.

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A copy. Teste. H. Stewart Jones, C. C.

[fol. 54] IN SUPREME COURT OF APPEALS

[Title omitted]

Upon a Writ of Error to a Judgment Rendered by the Court of Law and Chancery of the City of Norfolk on the 10th Day of August, 1921.

JUDGMENT—March 20, 1924

This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also its costs by it expended about its defence herein.

Which is ordered to be certified to the said court of Law and Chancery of the city of Norfolk.

A copy. Teste: H. Stewart Jones, C. C.

[fol. 55] IN SUPREME COURT OF APPEALS

CLERK'S CERTIFICATE

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing is a true and accurate copy of the record in the case of James C. Davis, Director General, Etc. v. John L. Roper Lumber Company on file and of record in my said office.

Given under my hand and the seal of this court this 5th day of May, 1924.

H. Stewart Jones, C. C.

IN SUPREME COURT OF APPEALS

JUDGE'S CERTIFICATE TO CLERK

I, Frederick W. Sims, President of the Supreme Court of Appeals of the State of Virginia, hereby certify that H. Stewart Jones, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, Clerk of said Court, and duly qualified.

Frederick W. Sims, President.

IN SUPREME COURT OF APPEALS

CLERK'S CERTIFICATE TO JUDGE

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, hereby certify that Frederick W. Sims, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, President of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court this 5th day of May, 1924.

H. Stewart Jones, Clerk. (Seal of the Supreme Court of Appeals of Virginia.)

Endorsed on cover: File No. 30,381. Virginia Supreme Court of Appeals. Term No. 418. James C. Davis, Director General and Agent, etc., petitioner, vs. John L. Roper Lumber Company. Petition for writ of certiorari and exhibit thereto, with notice and proof of service. Filed May 31st, 1924. File No. 30,381.

[fol. 56] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia

ORDER GRANTING PETITION FOR CERTIORARI—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of Appeals of the State of Virginia and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.